No. 171P07 TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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(State v Christopher M. Brown)

STATE OF NORTH CAROLINA

v

CHRISTOPHER MATTHEW BROWN

From NC Court of Appeals
(06-396)
From Buncombe
(03CRS51017, 03CRS51018, 03CRS51019)

[ENTERED: July 2, 2007]

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ORDER

Upon consideration of the petition filed on the 10th day of April 2007 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> **"Denied by order of the Court in conference, this the 27th day of June 2007.**
>
> **s/ Hudson, J.**
> **For the Court"**

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of July 2007.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

s/ Shaula A.Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. M Gordon Widenhouse, Jr., Attorney at Law,
For Christopher Matthew Brown (by E-Mail)
Mr. Issac T. Avery, III, Senior Deputy Attorney General, For State of NC (by E-Mail)
Mr. Ronald L. Moore, District Attorney
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No. COA06-396

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

[ENTERED: March 6, 2007]

STATE OF NORTH CAROLINA

v.

CHRISTOPHER MATTHEW BROWN

Buncombe County
No. 03CRS51017-19; 05CRS4883

Appeal by defendant from judgment entered 2 September 2005 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 8 January 2007.

Roy Cooper, Attorney General, by Special Counsel Isaac T. Avery, III, For the State.

Belser & Parke, P.A., by David G. Belser, and Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of second degree murder, assault with a deadly weapon inflicting serious injury, willful speed competition, reckless driving and driving left of center. The trial court arrested judgment on the latter three charges and

imposed a sentence of 157 months to 198 months for second degree murder and a concurrent sentence of 25 months to 39 months for assault with a deadly weapon inflicting serious injury. We find no error.

The State's evidence at trial tended to show that on 10 January 2003, defendant was traveling westbound on Highway 19/23 in a white Ford Ranger pick-up truck. Immediately past the intersection of 19/23 and Highway 151, defendant's truck pulled in front of a silver Ford Ranger truck driven by Nathan Clark ("Clark"). Neither defendant nor Clark knew each other before 10 January. Highway 19/23 becomes a two lane paved road running between Asheville and Canton with periodic half-mile passing lanes opening up in both directions. Both trucks moved into a passing lane as a car in front of them started to turn. Clark then tried to pass defendant on the right. Defendant merged back into the right lane despite the fact that Clark had pulled halfway beside defendant's truck. The two trucks approached a green Jeep just as a second passing lane opened up. Both trucks passed the Jeep. For a second time, Clark tried to pass defendant on the right. Defendant pulled in front of Clark and began driving down the middle of both lanes. Clark merged back into the passing lane and pulled along the side of defendant's truck. The two trucks proceeded close to one another and made contact. The passing lane ended and Clark's truck struck a 1996 Grand Marquis driven by Ed Mehaffey, and also occupied by a passenger, Margaret Hill. Defendant's car went off the right side of the road. Mehaffey was killed and Hill and Clark were seriously injured.

Joseph Stanley ("Stanley") testified that he saw both trucks heading westbound roughly a quarter of a mile before the accident. Stanley was driving eastbound with his window down. From the trucks, he heard "A motor racing up back and forth" and "[m]ashing on the accelerator and letting up." He observed defendant making hand gestures and described the behavior of both trucks as "antagonizing racing." Houston Sullivan ("Sullivan") was traveling eastbound on Highway 19/23 directly behind Mehaffey. Immediately before the accident, Sullivan observed the two trucks traveling next to one another as the passing lane began to end. Sullivan opined that both trucks were exceeding the speed limit. Sullivan stated that Clark was ultimately forced into oncoming traffic. A paramedic with the Buncombe County EMS spoke with defendant shortly after the accident. Defendant indicated that he slowed his truck down as a reaction to Clark riding too close from behind. Clark then attempted to pass and the defendant admitted that he sped up. The two trucks bumped into each other, and then the accident occurred.

Tom Brooks, certified as an expert in collision reconstruction, testified to the physical evidence and corroborated the consistency of the witnesses' statements. The two trucks struck one another multiple times in the seconds leading up to the collision. The vehicles were traveling approximately seventy miles per hour. Brooks expressed his opinion that Clark was attempting to avoid the eastbound traffic lane and defendant's actions were preventing him from doing so.

Defendant presented evidence tending to show he first pulled in front of Clark's silver truck near the intersection of Highway 12/23 and Highway 151. A car then pulled in front of defendant and forced him to brake suddenly. Defendant saw Clark waive an obscene hand gesture at him. Clark proceeded to follow defendant at a distance that was less than one-half of a car length. Clark continued to follow defendant as he passed a green jeep. At this point, defendant testified he was panicking and that he was more scared than he had ever been. After passing the Jeep, defendant tried to move to the right lane and Clark continued closely behind. Defendant then decided to move back to the left lane and to turn onto Fairmont Road toward his grandparents' house. Clark then drove up alongside of defendant and hit an oncoming car. Defendant did not recall the two trucks striking one another before the accident

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Defendant assigns error to the trial court's refusal to instruct the jury on the affirmative defense of duress for all charges. A trial court must give a requested instruction if it is a correct statement of the law and supported by the evidence. *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). "Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction." *State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446 (2005) (citation omitted). For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when

viewing the evidence in a light most favorable to the defendant. *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)).

Defendant requested the following instruction:

> There is evidence in this case tending to show that the defendant acted only because of [duress]. The burden of proving [duress] is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of [duress] is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

N.C.P.I Crim. 310.10. The defense of duress is not applicable to defendant's second degree murder charge. *See State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 888 (2001). As to the remaining charges, a defendant would have to show that the duress was "present, imminent or impending" and that any reactionary action was taken based on a "well-grounded apprehension of death or serious bodily harm." *State v. Kearns*, 27 N.C. App. 354, 357. 219

S.E.2d 228, 230-31 (1975). Duress, however, "cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *Id.*, 219 S.E.2d at 231. There must be evidence supporting each element of duress for the trial court to instruct the jury on that defense. *Smarr*, 146 N.C. App. at 55, 551 S.E.2d at 888.

Relying on *State v. Borland*, 21 N.C. App. 559, 205 S.E.2d 340 (1974), defendant argues that he was entitled to an instruction on duress for each of the motor vehicle offenses for which he was convicted. In *Borland*, the defendant attempted to evade an unmarked car that, unbeknownst to him, was occupied by a deputy sheriff and a recent arrestee. *Id.* at 561-62, 205 S.E.2d at 342-43. An instruction on duress was deemed necessary based on evidence that the unmarked car pulled up on defendant's bumper, flashed the high beams, honked the horn and fired off three rounds from a revolver. *Id.* at 561, 205 S.E.2d at 342. The court found defendant had "reasonable grounds to fear for his safety." *Id.* at 566, 205 S.E.2d at 345.

Even when considering the evidence in a light most favorable to the defendant, the record does not support a jury instruction on duress. First, the evidence does not show the existence of a situation which warranted in defendant a "well-grounded apprehension of death or serious bodily harm." *Kearns,* 27 N.C. App. at 357, 219 S.E.2d at 230-31. Here, defendant testified that he pulled in front of Clark's truck. In response, Clark used an obscene hand gesture, appeared upset and drove to within

one-half of a car length of defendant's bumper. Defendant noticed that Clark was much bigger than he was. Clark continued down the road following closely and driving erratically. Clark's behavior lacked the reasonable threat of imminent death or serious injury that was present in *Borland* and that would be necessary to excuse defendant's actions. "Apprehension of loss of property, or of slight or remote personal injury, is no excuse." *Borland*, 21 N.C. App. at 564, 205 S.E.2d at 344 (citation omitted).

Second, defendant had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. The evidence, considered in defendant's favor, shows that he had ample opportunity to either maintain a safe speed or to pull over off the highway. Upon realizing that Clark had not turned off the highway, defendant "lost all train of thought and just started running from him." The prosecutor questioned defendant about his speed on the fifty-five mile per hour road immediately before the accident.

> Q: And prior to any point in time of this what Trooper Brooks calls as the area of impact, you were driving proper? You had not done anything illegal?
>
> A: I went over the speed limit.
>
> Q: Witnesses said you were going over seventy miles an hour at least. Is that fair to say?
>
> A: I would say sixty-five to seventy.

Defendant controlled his own vehicle and could have avoided speeding or reckless driving. Furthermore, defendant had multiple opportunities to pull his truck over prior to the accident. Defendant could have turned left on Indian Branch Road, left on Chandler Heights Road or right on Indian Branch Road. Defendant admitted that he would pull his truck over if he were put in the same situation a second time. Based on the evidence, the trial court was under no duty to charge the jury on duress.

Defendant next contends that two statements admitted during trial were improper opinion testimony as to the intention of another person on a particular occasion. Defendant first challenges testimony of the State's accident reconstruction expert, Tom Brooks. Brooks was asked his opinion as to whether Clark "was trying to get out of the way of oncoming traffic" immediately before the accident. Defendant's objection was overruled. Brooks responded with a "yes" and indicated that his opinion was based on statements made by Clark as well as the physical evidence.

The trial court is given a wide latitude of discretion when determining the admissibility of expert testimony. *State* v. *Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985). An expert may give an opinion, provided it will assist the trier of fact to understand the evidence or to determine a fact in issue. *State* v. *Purdie*, 93 N.C. App. 269, 275, 377 S.E.2d 789, 792 (1989). Expert opinion is inadmissible "if it is impossible for anyone, expert or nonexpert, to draw a particular inference from the evidence." *Id.* at 275, 377 S.E.2d at 792.

The trial court found Brooks to be qualified in the field of accident reconstruction. To arrive at his challenged opinion, Brooks employed methods that have been found to be reliable, such as a review of both the physical evidence and witness testimony. *See Purdie*, 93 N.C. App. at 276, 377 S.E.2d at 793. As an accident reconstruction expert, Brooks was more qualified than the trier of fact to assess whether Clark was trying to avoid oncoming traffic immediately before the accident. His opinion that Clark, "was trying to get out of that traffic" is a reasonable inference drawn from the evidence and could reasonably be considered of assistance to the trier of fact. Defendant, therefore, has not shown that the trial court abused its discretion by admitting the evidence.

In addition, defendant challenges a portion of Houston Sullivan's testimony as improper opinion evidence. Sullivan was asked what he meant in his statement to the highway patrol where it read "the lane merged into one lane" and "[t]he white truck was in the right lane forcing the other truck into oncoming traffic." Sullivan clarified his statement by stating that "[h]is [Clark's] lane was ending" and "he was trying to force his way back over, and he was forced to take the path that he was on." Defendant did not object at trial, and we proceed under plain error review.

Before engaging in a plain error analysis, it must first be determined whether the trial court's action constituted error. *State v. Duff*, 171 N.C. App. 662, 669-70, 615 S.E.2d 373, 379 (2005) (citations omitted). "Opinion evidence is always admissible

when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences." *State v. Workman*, 344 N.C. 482, 510, 476 S.E.2d 301, 316 (1996) (citations omitted). Such testimony is known as a shorthand statement of fact and has been upheld regardless of whether the statement appears to be an opinion. *See State* v. *Hunt*, 325 N.C. 187, 193, 381 S.E.2d 453, 457 (1989) (upholding witness testimony that the defendant reacted to certain incriminating remarks with "a long glance like [his co-conspirator] better shut up."). *See also State* v. *Dawson*, 278 N.C. 351, 357, 180 S.E.2d 140, 144 (1971) (upholding witness testimony that defendant "seemed to be joking" as a shorthand statement of fact). The admission of the statement at issue was not error, plain or otherwise.

No error.

Judges McCULLOUGH and LEVINSON concur.

* * *

JUDGE GUICE'S CHARGE TO THE JURY:

Members of the jury, all of the evidence has been presented. It is now your duty to decide from this evidence what the facts are. You must then apply the law which I'm about to give you to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied to him.

The defendant has entered pleas of "not guilty." The fact that he has been indicted is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty" he is not required to prove his innocence. He is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the witness stand. In determining

whether to believe any witness you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, the manner and appearance of the witness, any interest, bias or prejudice the witness may have, the apparent understanding and fairness of the witness, whether the testimony of the witness is reasonable and whether the testimony of the witness is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

Now, ladies and gentlemen of the jury, there are two types of evidence from which you may find the truth as to the facts of the case: direct evidence and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. Circumstantial evidence is proof of a chain or group of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in these cases. After weighing all of the evidence, if you're not convinced of the guilt of the defendant

beyond a reasonable doubt you must find him not guilty.

Now, members of the jury, you may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness you may take the interest of the witness into account. If, after doing so, you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence.

Now, members of the jury, in this case you have heard evidence from a witness who has testified and expressed opinions. A witness is permitted to testify in the form of an opinion in a field where he purports to have specialized skill or knowledge. As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of a witness who has expressed opinions you should consider, in addition to the other tests of credibility and weight, the witness's training, qualifications and experience, or the lack thereof, the reasons, if any given, for the opinion, whether the opinion is supported by facts that you find from the evidence, whether the opinion is reasonable, and whether the opinion is consistent with other believable evidence in the case.

You should consider the opinion of a witness who has been allowed to express it, but you're not bound by it. In other words, you're not required to accept a witness's opinion to the exclusion of the

facts and circumstances disclosed by other testimony.

Members of the jury, when evidence has been received from a witness in the form of an opinion, you may only consider the opinion of a witness which is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Ladies and gentlemen, when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with the testimony of the witness at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the testimony of the witness at this trial.

Members of the jury, when evidence has been received tending to show that a witness has been convicted of a criminal charge, you may consider this evidence for one purpose only. If, considering the nature of the crime or crimes you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the testimony of the witness at this trial. Except as it may bear on

this decision, this evidence may not be considered by you in your determination of any fact in this case.

Now, ladies and gentlemen of the jury, the defendant has been charged with assault with a deadly weapon inflicting serious injury. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt. First, that the defendant assaulted the victim, Margaret Hill, by operating his motor vehicle in a manner such that it constituted a deadly weapon, and that he did this intentionally. Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. A motor vehicle can be a deadly weapon. And in determining whether the motor vehicle was a deadly weapon, you should consider the nature of the motor vehicle and the manner in which it was used or operated.

Now, members of the jury, a driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of assault with a deadly weapon inflicting serious injury provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied. Culpable or criminal negligence is such recklessness or carelessness proximately resulting in injury or death as imports a thoughtless disregard of consequence or heedless indifference to the safety and rights of others. And thirdly, the State must prove that the defendant inflicted serious injury upon the victim.

Now, members of the jury, if you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant intentionally assaulted the victim, Margaret Hill, by intentionally operating his motor vehicle in a manner such that it constituted a deadly weapon, and that the motor vehicle was a deadly weapon thereby inflicting serious injury upon the victim, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Now, members of the jury, the defendant has been accused of second-degree murder. Under the law and the evidence in this case, it is your duty to return one of the following verdicts: guilty of second-degree murder or guilty of involuntary manslaughter or guilty of misdemeanor death by vehicle or not guilty. Second-degree murder is the unlawful killing of a human being with malice. Involuntary manslaughter is the unlawful, unintentional killing of a human being by an act done in a culpably-negligent way misdemeanor death by vehicle is the unintentional killing of a human being which is proximately cause by the violation of any law or ordinance governing the operation of motor vehicles. I charge that for you to find the defendant guilty of second-degree murder the State must prove six things beyond a reasonable doubt. First, that the defendant was driving a vehicle on a highway o f the state of North Carolina. Second, that while the vehicle was being operated by the defendant the motor vehicle was involved in an accident or collision. Thirdly, that a person was killed in this

accident or collision. Fourthly, that the defendant violated the following law or laws of this state governing the operation of motor vehicles. The laws of this state make it unlawful to engage in speed competition on a highway or to operate a motor vehicle by failing to drive that motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel, or to operate a motor vehicle without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property. The court will define these laws and give their elements to you later in this charge. Fifthly, that the defendant acted unlawfully and with malice. Malice is a necessary element which distinguishes second-degree murder from manslaughter. Malice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. The court instructs you that the term "deliberately bent on mischief" connotes conduct as exhibits conscious indifference to consequences wherein probability of harm to another within the circumference of such conduct is reasonably apparent, though no harm to such other is intended. It connotes an entire absence of care for the safety of others which exhibits indifferences to consequences. It connotes conduct where the actor, having reason to believe his action may injure another, does it being indifferent to whether it injures or not. It indicates a realization of the imminence of danger and reckless disreard, completely indifferent and unconcerned for probable consequences. It connotes conduct where the actor is

conscious of his conduct and conscious of his knowledge of the existing conditions that injury would probably result, and that with reckless indifference to consequences that actor consciously and intentionally did some wrongful act to produce injurious result. And sixthly, the State must prove that the death of the victim was proximately caused by the unlawful act or acts of the defendant done in a malicious manner. A proximate cause is a real cause without which the victim's death would not have occurred. The defendant's act or acts need not have been the last or nearest cause. It is sufficient if they concurred with some other cause acting at the same time which, in combination with it, proximately caused the victim's death.

If you do not find the defendant guilty of second-degree murder, you must consider whether he is guilty of involuntary manslaughter. Involuntary manslaughter is the unlawful, unintentional killing of a human being by an act done in a culpably-negligent way. For you to find the defendant guilty of involuntary manslaughter the state must prove two things beyond a reasonable doubt. First, that the defendant violated a traffic law or laws as heretofore stated in the fourth element of the charge on second-degree murder. That the defendant's violation of laws or law governing the operation of a motor vehicle constituted culpable negligence. Such violation will constitute culpable negligence if the violation is willful, wanton or intentional, but where there is an unintentional or inadvertent violation of law, such violation standing alone does not constitute culpable negligence. To constitute culpable negligence, the inadvertent or

unintentional violation of the law must be accompanied by reckless or probable consequences of a dangerous nature when tested by the rule of reasonable foresight amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others. And second, that the defendant's culpable negligence proximately caused the victim's death.

If you do not find the defendant guilty of involuntary manslaughter, you must consider whether he is guilty of misdemeanor death by vehicle. Misdemeanor death by vehicle differs from involuntary manslaughter in that the State need not prove that the defendant was culpably negligent, only that his violation of other law or laws governing the operation of motor vehicles proximately caused the victim's death.

So, ladies and gentlemen, the court charges that if you find, from the evidence and beyond a reasonable doubt, that on or about the alleged date the defendant drove a vehicle on a highway and that when he did so, he violated one or more of the following laws – to wit, engaging in speed competition on a highway or operating a motor vehicle and failing to drive that motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel or by operating a motor vehicle without due caution and circumspection and at a speed or in a manner so as to engager or be likely to endanger any person or property, and that the defendant acted unintentionally and so recklessly and wantonly as to manifest in a mind utterly without regard for human

life and social duty and deliberately bend on mischief, and that this conduct constituted malice, and that such conduct proximately caused the death of the victim, it would be your duty to return a verdict of "guilty of second-degree murder." However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of "guilty of second-degree murder."

You must then determine whether the defendant is guilty of involuntary manslaughter. If you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant drove a motor vehicle on a highway and violated one or more of the traffic laws of North Carolina- to wit, engaging in speed competition on a highway or operating a motor vehicle and failing to drive that motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel, or by operating a motor vehicle without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property – well – any person or property, and that such violation proximately caused the death of the victim, it would be your duty to return a verdict of "guilty of misdemeanor death by vehicle." However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of "not guilty."

Now, ladies and gentlemen of the jury, the defendant has been accused of reckless driving. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable

doubt. First, that the defendant drove a vehicle upon a highway. Members of the jury, highway 19/23 is a highway. And second, that he drove that vehicle by exceeding the speed limit, not remaining in his lane of travel and having contact with another vehicle, and that in so doing, he acted without due caution and circumspection. And third, that he drove at a speed or in a manner so as to endanger or be likely to endanger any person or property.

Now, members of the jury, if you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle upon a highway by exceeding the speed limit, not remaining in his lane of travel and having contact with another vehicle, and that in so doing he acted without due caution or circumspection and drove at a speed or in a manner so as to endanger or be likely to endanger any person or property, it would be your duty to return a verdict of "guilty." If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of "not guilty."

Now, members of the jury, the defendant has been accused or charged with willfully engaging in a speed competition on a street or highway. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt. First, that the defendant, while operating a motor vehicle, engaged in a speed competition with another vehicle. Secondly, that this speed competition occurred on a street or highway. And third, that the defendant acted willfully. If you find from the evidence and beyond a reasonable doubt that on or

about the alleged date the defendant, while operating a motor vehicle, willfully engaged in a speed competition with another motor vehicle on a street or highway it would be your duty to return a verdict of "guilty." If you do not so find or if you have a reasonable doubt as to one or more of these things it would be your duty to return a verdict of "not guilty."

Now, members of the jury, the defendant has been charged with failing to drive his motor vehicle on the right half of the highway that was of sufficient width for more than one lane of travel. For you to find the defendant responsible for this infraction the State must prove three things beyond a reasonable doubt. First, that the defendant was the driver of the vehicle. Second, that this vehicle was on a highway. And third, that the defendant failed to drive the vehicle on the right half of the highway that was of sufficient width for more than one lane of travel. If you find from the evidence and beyond a reasonable doubt that on or about the alleged date the defendant was the driver of a vehicle that was on a highway and that the defendant failed to drive the vehicle on the right half of the highway that was of sufficient width for more than one lane of travel, it would be your duty to return a verdict of "responsible." If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of "not responsible."

Now, members of the jury, you have heard the evidence and the arguments of counsel. If your recollection of the evidence differs from that of the

prosecuting attorneys or the defense attorneys, you are to rely solely upon your own recollection. It is your duty to remember the evidence whether it has been called to your attention or not. You should consider all of the evidence, the arguments, the contentions and positions urged by the attorneys and any other contention that arises from the evidence and, using your common sense, you must determine truth in these cases.

Now, members of the jury, the highest aim of every legal contest is the ascertainment of truth. Somewhere within the facts of every case the truth abides, and where truth abides, justice steps in, garbed in its robes, and tips the scales. In this case you have no friend to reward, no enemy to punish, no anger to appease or sorrow to assuage. Yours is the solemn duty to let your verdict speak the everlasting truth.

Ladies and gentlemen of the jury, as the presiding judge I am required by the law to be impartial. You should not mistakenly infer that I have implied that any of the evidence should be believed or disbelieved, that a fact has been proved or has not been proved, or as to what your findings ought to be. Instead, you and you alone are to find the facts and to render verdicts reflecting the truth.

Members of the jury, you may not return a verdict until all twelve jurors agree unanimously as to what your verdicts shall be. You may not return or render a verdict by a majority vote.

The procedure that you will follow is that once you have arrived at your unanimous verdict in each

of the cases your foreperson will indicate what that verdict is on the jury forms that you're going to be submitted, and I'll go over those with you in a minute. But once you have arrived at your unanimous verdict and the foreperson has recorded that verdict on the respective forms and you've done that as to each of these cases, please knock on the door to the jury room, let the bailiff know that and then we'll have you brought back to this courtroom to pronounce that verdict.

Now, ladies and gentlemen of the jury, the Court recommends that when you get to your jury room that you select one of your members to serve as your foreperson and to lead you during the course of your deliberations. Once you have selected your foreperson, please knock on the door to the jury room, let the bailiff know that. He will then deliver to you these written verdict forms and you may then begin your verdict deliberations. Do not begin your verdict deliberations until you have received these written verdict forms from the bailiff.

Now, ladies and gentlemen of the jury, you will note that there is a verdict form for each of the cases. In 05-CRS-4883, which is the case involving the prosecuting witness Margaret Hill, you will note that there are two alternatives, and you will also note the heading of the case at the top and this language: "We the jury, unanimously find the defendant, Christopher Brown," and as I said, two alternatives. First, "guilty of assault with a deadly weapon inflicting serious injury" or "not guilty." Each of these alternatives is preceded by a parenthesis, so when the jury arrives at its

unanimous verdict, the foreperson will record that verdict by making an "x" mark or a check mark in the appropriate parenthesis. The foreperson will then date and sign this verdict sheet.

Now, you'll note that each of the verdict sheets follow the same format, and in the case of 03-CRS-51017 you'll note that there are four alternatives: "guilty of second-degree murder" or "guilty of involuntary manslaughter" or "guilty of misdemeanor death by a motor vehicle" or "not guilty." In 03-CRS-51019 you will note that there are two alternatives: "guilty of reckless driving" or "not guilty." And in 03-CRS-51018 you will note that there are two alternatives, "guilty of speed competition" or "not guilty." And in 04-CRS-2129 you'll note that there are two alternatives: "responsible for failing to operate his motor vehicle upon the right half of the highway that was of sufficient width for more than one lane of travel" or "not responsible."

Now, could I have counsel approach the bench?

(All counsel approached the bench.)

COURT: Ladies and gentlemen of the jury, the Court has noted that some of you during the course of this trial have been taking notes, and the court would instruct you that when you begin your deliberations you may use your notes to help refresh your memory as to what was said in court. However, the Court would caution you that you're not to give your notes or the notes of any other juror any undue significance. While taking notes, a juror may fail to hear important portions of testimony. Any notes

taken by you are not to be considered as evidence in this case. Your notes are not an official transcript of the trial, and for that reason you must remember that in your jury deliberations notes are not entitled to any greater weight than the individual recollections of all of the other jurors. So the Court wanted to give you that instruction inasmuch as you have been permitted to take notes during the course of this trial.

Now, if I could ask you all to come up here one more time.

(All counsel approached the bench.)

All right, ladies and gentlemen, one further instruction. There has been evidence received during the course of this trial dealing with the character or the reputation of the defendant for truthfulness. The court would instruct you that you may consider this evidence for one purpose only. If you believe all or any part of this evidence and find that it bears upon the defendant's truthfulness, you may consider it together with all other facts and circumstances bearing upon the defendant's truthfulness in deciding whether you will believe or disbelieve the testimony of the defendant at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any other fact in this case.

All right. With that, ladies and gentlemen of the jury, I'm going to let you now retire to your jury room. The twelve of you, and select your foreperson. I'm also going to give the verdict sheets to the bailiff. When you have selected your foreperson, knock on

the door to the jury room. The bailiff will then deliver to you these written verdict sheets and you may then begin your verdict deliberations. So you twelve may now retire to the jury room and select your foreperson.

You've been given a number of exhibits during the course of this trial. At this particular time let me ask you to leave all of that in your chairs. Those of you who took notes, you may take your notes and follow the instructions I've given you with respect to your notes, but all of the other exhibits, you'll leave those in your chairs.

JUROR: Some of us have been taking notes on these papers.

MR. HASTY: The State does not object to them taking the materials back.

MR. THORTON: No problem.

COURT: Those of you who have taken notes on your exhibits may take that with you.

(Jury left the courtroom at 10:13 a.m. and the proceedings continued out of their presence as follows:)

COURT: Now, to the three alternate jurors, there

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REQUESTED INSTRUCTION ON DURESS

[Entered: September 1, 2005]

Petitioner requested the trial court to instruct the jury on the defense of duress, pursuant to North Carolina Pattern Jury Instruction 310.10, as follows:

> There is evidence in this case tending to show that the defendant acted only because of duress. The burden of proving duress is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not commit the crime. His assertion of duress is a denial that he committed any crime. The burden remains on the state to prove the defendant's guilt beyond a reasonable doubt.

The trial court refused to give this requested instruction.